

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : NO. 93-386-2
 : :
 : CIVIL ACTION
JAMES LEATH : NO. 05-1429

MEMORANDUM

Bartle, J.

April 25, 2005

Before the court is the motion of defendant James Leath under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence.

Leath was convicted by a jury of conspiracy to distribute cocaine base (crack) in violation of 21 U.S.C. § 846 and sentenced to life imprisonment. The Court of Appeals affirmed his conviction on April 27, 1995. United States v. Rivers, 54 F.3d 770 (3d Cir. 1995).

In essence, Leath's pending motion contends that the court improperly applied the Sentencing Guidelines in light of the recent Supreme Court decision in United States v. Booker, 125 S. Ct. 738 (2005).¹ In Booker, the court held the Federal Sentencing Guidelines unconstitutional insofar as they are

1. While Leath refers to Blakely v. Washington, 124 S. Ct. 2531 (2004), that case is inapplicable since it does not apply to sentencing under the Federal Sentencing Guidelines. See Blakely, 124 S. Ct. at 2538 n.9. We will assume that he is relying on Booker. As he is a pro se movant, we "hold his documents to a less stringent standard than those drafted by attorneys." United States v. Jasin, 280 F.3d 355, 361 (3d Cir. 2002).

mandatory. From now on, courts must simply consider them as a factor, along with others, in making sentencing decisions. 18 U.S.C. § 3553(a); Booker, 125 S. Ct. at 756-57.

Under subsection (3) of the sixth paragraph of 28 U.S.C. § 2255, a motion to vacate, set aside, or correct a sentence is timely if it is filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" Leath's motion was filed within one year after Booker was decided.

The Supreme Court in Booker clearly recognized for federal criminal defendants a new right as that term is used under subsection (3) of the sixth paragraph of § 2255. Thus, the appropriateness of Leath's Booker claim depends on the second part of that subsection, that is, whether this newly recognized right not to be sentenced under the mandatory Federal Sentencing Guidelines is "made retroactively applicable to cases on collateral review." While a new right must be recognized by the Supreme Court, the lower federal courts may determine the issue of retroactivity of that new right when this issue, as here, has not been decided by the Supreme Court and when it is raised in a petitioner's first § 2255 motion. United States v. Swinton, 333

F.3d 481, 485-87 (3d Cir. 2003).² This is Leath's first such motion.

Our Court of Appeals held in Swinton that the newly recognized constitutional right under Apprendi v. New Jersey, 530 U.S. 466 (2000), was not retroactive. Swinton, 333 F.3d at 491. In Apprendi, the Supreme Court ruled that, other than a prior conviction, any sentencing enhancement beyond the statutory maximum must be based upon facts found by a jury beyond a reasonable doubt. Following the reasoning in Teague v. Lane, 489 U.S. 288 (1989), the Court of Appeals explained that Apprendi announced a new rule of criminal procedure and that this new rule would not apply retroactively unless it "(1) places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; or (2) requires the observance of those procedures that are implicit in the concept of ordered liberty." Swinton, 333 F.3d at 487. The court concluded that neither exception was satisfied. Booker is similar to Apprendi. In Booker, Justice Stevens' opinion for the Court ended with the following:

Accordingly we reaffirm our holding in Apprendi: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by

2. We note, however, that where the issue of retroactivity is evaluated with respect to a second or successive § 2255 motion, the new rule is retroactive to cases on collateral review only where the Supreme Court has expressly held that it is. See 28 U.S.C. § 2255 ¶ 8; Tyler v. Cain, 533 U.S. 656, 662 (2001); In re Olopade, ___ F.3d ___, No. Civ.A. 05-1617, 2005 WL 820550 (3d Cir. Apr. 11, 2005); Swinton, 333 F.3d at 486.

the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

Booker, 125 S. Ct. at 756. We see no reason why the analysis in Swinton concerning Apprendi should not apply equally to Booker and compel the conclusion that it is likewise not retroactive.

Since Booker, in our view, is not retroactive on collateral attack of a sentence, we will deny Leath's motion under 28 U.S.C. § 2255.

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ORDER

AND NOW, this 25th day of April, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that motion of defendant James Leath under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.